

**REMARKS BY A WORKING GROUP OF INVESTMENT FIRMS CREATED
WITHIN THE SCOPE OF FOGAIN (SPANISH INVESTORS COMPENSATION
SCHEME FOR INVESTMENT FIRMS) ON CESR TECHNICAL ADVICE TO
THE EUROPEAN COMMISSION IN THE CONTEXT OF THE MIFID
REVIEW- INVESTOR PROTECTION AND INTERMEDIARIES**

Part 1: Requirements relating to the recording of telephone conversations and electronic communications:

1. Do you agree with CESR that the EEAA should have a recording requirement? If not, please explain your reasoning.

Yes, but it should not be compulsory for entities to have to accept orders given by telephone. There should only be a recording requirement for entities that decide to accept that method for communicating transactions.

2. If the EEA is to have a recording requirement do you agree with CESR that it should be minimum harmonising? If not, please explain your reasoning.

Due to the similar application of regulatory requirements in the European Union, it is advisable that the establishment of a recording requirement be subject to minimum harmonising principles. Within this principle, the minimum regulatory requirements should bear in mind the attainment of the goal that is sought at the lowest possible cost.

3. Do you agree that a recording requirement should apply to conversations and communications which involve:
 - The receipt of client orders;
 - The transmission of orders to entities not subject to the MIFID recording requirement;
 - The conclusion of a transaction when executing a client order;
 - The conclusion of a transaction when dealing on own account?

Yes.

4. If you do not believe that a recording requirement should apply to any of these categories of conversation/communication please explain your reasoning.

5. Do you agree that firms should be restricted to engaging in conversations and communication that fail to be recorded on equipment provided to employees by the firm?

Yes. The purpose of recording the conversations would be seriously jeopardised if there were not a clear definition of the instruments that may be used for the relevant conversations, and if employees were allowed to have these kinds of conversations using instruments or devices that are not recorded.

6. Do you agree that firms providing portfolio management services should be required to record their conversations/communications when passing orders to other entities for execution based on their decisions to deal for their clients? If not, please explain your reasoning.

The reasons making it advisable to record conversations when providing the service of receiving and passing on or executing orders are not considered in the same way when an entity having a portfolio management mandate makes an investment decision on behalf of its client. In the latter case, it is not foreseeable that disputes between the client's instructions and what the entity executes will have to be solved, because the entity is not executing instructions received from its client.

Therefore, taking into account that cost should be a very important consideration in this matter, it would be more appropriate not to impose recording requirements on the entities dedicated to managing portfolios, when the terms of the portfolio management are being discussed with clients (but when direct investment instructions are received the conversation should be recorded), or with the entity to which the order is sent, said order having originated by the entity itself managing the portfolio.

7. Do you think that there should be an exemption from a recording requirement for:
- Firms with fewer than 5 employees and/or which receive orders of a total of €10 million or under per year; and
 - All orders received by investment firms with a value of €10,000 or under.

There doesn't seem to be any sense in excluding smaller entities from the recording requirement, because it could jeopardise the purpose of that requirement in a similar way as it could happen in respect of other larger entities. In this area it seems difficult to adapt the requirement in proportion to the size of the entity (establishing a minimum size), but this adaptation is possible in other areas where similar effects can be achieved with lesser means in smaller entities.

Therefore, the Group favours the non-exclusion of smaller entities from meeting the reporting requirement.

8. Do you agree that records made under a recording requirement should be kept for at least 5 years. If not, please explain why and what retention period you think would be more appropriate.

Storing recordings entails a cost that must be demanded of entities only insofar as it suits the purpose fulfilled by the recordings. The Group considers that one year could be a sufficiently long term to meet that purpose, because of the following:

- It is a very reasonable term for receiving a claim from a client and being able to match it with the recorded order. It is not at all frequent that claims be made or disputes be raised by clients more than a year after an order is given and executed. Especially considering that shortly after clients are sent a notice of the transactions that were executed and the settlement thereof.

- If there are any suspicions of market abuse, one year seems to be sufficient time for the relevant supervisory authority to take action.

Five years, therefore, is an excessively long term that is not justified in light of the purpose of the recording.

9. Are there any elements of CESR's proposals which you believe require further clarification? If so, please specify which element requires further clarification and why?

The Group considers that it should be acknowledged, in some way or other, that the recording of conversations may be an important part in registering investment advice, an area for which MiFID does not establish any specific line of action.

The Group proposes to CESR that this be mentioned in the advice it provides to the European Commission.

10. In your view, what are the benefits of a recording requirement?

Recording conversations within the scope stated in the CESR document and in question 3 has positive effects insofar as it can be used as evidence in the event of claims by clients, on the one hand, and on the other hand it will allow monitoring and checking of behaviours that might represent market abuse.

The Group considers that both of these functions are relevant.

11. In your view, what are the additional costs of the proposed minimum harmonising recording requirement (for fixed-line, mobile and electronic communications)? Please specify and where possible please provide quantitative estimates of one-off and ongoing costs.

The Group does not have data in this respect.

12. What impact does the length of the retention period have on costs? Please provide quantitative estimates where possible.

The Group does not have specific quantitative data at present, but storing the recordings surely represents a cost that must be considered in terms of its usefulness, as replied under question 8 above.

Part 2: Execution quality data (Art 44(5) of the MIFID Level 2 Directive):

13. Do you agree that to enable firms to make effective decisions about venue selection it is necessary, at minimum, to have available data about prices, costs, volumes, likelihood of execution and speed across all trading venues?

Yes.

14. How frequently do investment firms need data on execution quality: monthly, quarterly, annually?

Since it is information that not only refers to execution prices (data largely covered by the current post-transparency regime as far as shares are concerned), how frequently this information is prepared and disseminated should be based, on the one hand, on its being useful for the necessary review from time to time of best execution policies by investment firms, and on the other hand it should not unnecessarily increase costs for trading venues, because the cost would then probably be passed on to the users of these systems.

In light of this, the Group considers that quarterly data would be appropriate.

15. Do you believe that investment firms have adequate information on which to make decisions about venue selection for shares?

Investment service companies currently have a degree of information allowing them to meet their obligations in the field of best execution, particularly in cases where the execution of transactions remains very centralised at a single venue.

The Group admits, however, that progress can be made on the degree of information made available at trading venues, because there is surely a margin of improvement in the scope of harmonisation and subsequent comparability in the preparation and presentation of data by those trading venues.

16. Do you believe investment firms have adequate information on which to make decisions about venue selection for classes of financial instruments other than shares?

The way in which the best execution principle can be applied to products that are basically traded bilaterally, providing clients with a counterparty and where it is harder to find trading venues operating as actual liquidity centres for retail traders (for instance, this would be the case in the Fixed Income market), makes it hard to have comparable information between different execution alternatives, unlike the stock exchange, where that information is available.

This market structure implies that the application of the best execution principle itself must be different in relation to these products than in respect of shares, and to this end the available information will be less, and it will not even be as representative or relevant.

17. Do you agree with CESR's proposal that execution venues should produce regular information on their performance against definitions of various aspects of execution quality in relation to shares? If not, then why not?

Yes.

18. Do you have any comments on the following specifics of CESR's proposal:

- Imposing the obligation to produce reports on regulated markets, MTFs and systematic internalisers;

- Restricting the coverage of the obligation to liquid shares;
- The execution quality metrics;
- The requirements to produce the reports on a quarterly basis?

The specifics in the CESR proposal are adequate according to the Group.

19. Do you have any information on the likely costs of an obligation for execution venues to provide regular information on execution quality relating to shares? Where possible please provide quantitative information on one-off and ongoing costs.

The Group does not have this information.

20. Do you agree with CESR that now is not the time to make a proposal for execution venues to produce data on execution quality for classes of financial instruments other than shares?

As mentioned in the reply to question 16, the Group considers that advances in this area in relation to products for which the market structures are very different compared to the stock exchange should be preceded by a larger discussion on the structure of those markets and their transparency regime.

Part 3: MIFID complex vs. non complex financial instruments for the purposes of the Directive's appropriateness requirements:

21. Do you have any comments about CESR's analysis and proposals as set out in this Chapter?

The Group coincides with CESR in that the classification of complex and non-complex financial instruments must be grounded on an analysis of the risk of each product.

22. Do you have any comments on the proposal from some CESR members that ESMA should work towards the production of binding Level 3 material to distinguish which UCITS should be complex for the purpose of the appropriateness test?

No.

23. What impact do you think CESR's proposals for change would have on your firm and its activities? Can you indicate the scale of, or quantify, any impact you identify?

The Group does not have specific quantitative data but it estimates that generally the impact will not be very significant, because the structure for distinguishing between complex and non-complex UCITS for the purpose of the appropriateness is already established at these entities.

Part 4: Definition of personal recommendation:

24. Do you agree with the deletion of the words “through distribution channels or” from Article 52 of the MIFID Level 2 Directive?

No. The fact that electronic or similar devices may be used to give personal recommendations (and hence to give advice) should not affect the fact that in such cases those channels represent “communication channels” rather than “distribution channels.” “Distribution channels,” as their name suggests, are used to “distribute” but not for providing advice.

The distinction between “communication channels” used to give advice to specific clients and “distribution channels” focusing on distributing products among the public or among a large number of clients, without (by definition) taking into account in such event the personal circumstances of the recipients, is a conceptual distinction that can be made at the interpretation level, without the need to amend the Directive in this section. Accordingly, we consider that the current wording of the Directive is appropriate.

Part 5: Supervision of tied agents and related issues:

25. Do you agree with CESR that the MIFID regime for tied agents has generally worked well, or do you have any specific concerns about the operation of the regime?

The Group considers that it is desirable that harmonizing be achieved at a European level as regards the level of information so that the entities, the supervisor and especially the clients are able to have access to the identity and contact details of the agents acting in each jurisdiction, stating which entity they work for.

26. Do you agree with the proposed amendments to Article 23, 31 and 32 of MIFID?

The Group thinks that the proposals on the regulation of tied agents made by CESR are appropriate.

27. Could you provide information on the likely impacts of the deletion of the ability of tied agents to handle client money and financial instruments?

The Group considers that such an amendment of the Directive would have no impact on Spanish entities because the prohibition already exists in Spanish regulations.

Part 6: MIFID Options and Discretions

28. Do you agree with the suggested deletions and amendments to the MIFID texts proposed in this chapter?

The Group considers that the proposals made by CESR regarding the delegation of supervision tasks and the regulation of ties agents make sense.

Regarding the proposal on the request for statistical information and for supervising branches, the Group considers that it would not have practical implications for Spanish entities.